SUPREME COURT, U.S.

AUG 14 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 367

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY and CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Page

Grounds on which jurisdiction is invoked 2

Questions presented for review 3

Statement of the case 5

Argument 17

The order for separate trials 17

The liability of the railroads 19

Appendix A—Opinion 29

Appendix B—Judgment 47

Cases Cited.

Best v. Yerkes, 77 N. W. (2d) 23 27

Copeland v. C. B. & Q. R. R. Co., 293 F. 12 23

Erie Railroad v. Tompkins, 304 U. S. 64, 84 L. Ed. 1188 20

Houston E. & W. Texas Railway Co. v. Packing Co., 221 S. W. 316 (Tex. Civ. App.) 25

Jackson v. C. M. St. P. & P. R. R. Co., 238 Iowa 1253, 30 N. W. (2d) 97 20

Live Stock at Chicago, 213 I. C. C. 330, 341 25

Missouri Pacific Railroad Company v. Reynolds-Davis Grocery Company, 26 U. S. 366, 69 L. Ed. 1000 24

Mitchell Chamber of Commerce v. C. M. & St. P. Ry. Co., 129 I. C. C. 451, 456 25

Pennsylvania Railroad Company v. Hummel, 157 F. 89. 22

Reciprocal Switching at Mobile, 208 I. C. C. 151, 155 .. 25

Rick v. N. Y. C. & St. L. R. R. Co., 81 Atlantic 650 ... 25

R. W. Burch, Inc., v. Railway Express Agency, 201 I. C. C. 51, 52 25

Shapiro v. Boston & Maine R. R. Co., 99 N. E. 459, 213 Mass. 70 25
St. Louis-San Francisco Ry. Co. v. Ewan, 26 F. 2d 619. 23
St. L. & S. W. R. R. Co. v. Jackson & Co., 118 S. W. 853 (Tex. Civ. App.) 25
Waldron v. Director General of Railroads, 266 F. 196. 23

Statute Cited.

28 U. S. C. A., Section 1254 2

Textbooks Cited.

75 C. J. S., pp. 333-337 19
The Restatement, Torts, Sec. 392, p. 1064 19

Rule Cited.

Federal Rules of Civil Procedure:
Rule 20 (b) 16, 18
Rule 21 ..... 16, 18
Rule 42 ..... 3, 18, 27
Rule 42 (b) 5, 16, 17, 18

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Petitioner prays that this Court review a judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed a judgment of the United States District Court for the Southern District of Iowa in favor of W. E. Williams, against petitioner alone, in a personal injury action instituted by Williams against three railroads, hereafter referred to as "Rock Island", "Union Pacific" and "Northwestern."

The opinion of the Court below has not yet been reported, but will appear in .... F. (2d) .... It is printed in Appendix A hereto.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Eighth Circuit on June 6, 1957, pursuant to its opinion filed on that date. (See Appendix B.)

Timely petition for rehearing by petitioner was denied July 5, 1957.

Jurisdiction to review the judgment below by writ of certiorari is conferred by the Act of June 25, 1948, 62 Stat. 923. U. S. C. A., Title 28, Section 1254.

Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required because:

(a) The Court of Appeals for the Eighth Circuit has erroneously decided an important question of Federal Law arising under the Federal Rules of Civil Procedure, and particularly Rule 42 thereof, which has never been previously decided by this Court, but which should be here determined.

(b) The Court of Appeals for the Eighth Circuit has decided an important question of Iowa law in a way directly in conflict with the pronouncements of the Iowa Supreme Court on the same subject.

(c) The Court of Appeals for the Eighth Circuit has rendered a decision which directly conflicts with the decisions of the Courts of Appeals for the Third, Fourth, and Sixth Circuits, and in conflict with previous decisions of the Eighth Circuit Court of Appeals itself, on the same subject.

(d) The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings in the application of

the Federal Rules of Civil Procedure, and in the application of established rules of law to specific facts, and has sanctioned such departures by the District Court for the Southern District of Iowa, as to call for this Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW.

Three major questions, with certain subsidiary questions are presented by this record, which, we believe, require that this Court exercise its discretion to review the judgments below. The first question is procedural in character, and is of importance in the administration of the Federal Rules of Civil Procedure, and Rule 42 thereof. This question may be stated as follows:

> "Does the discretion to order separate trials of particular issues vested in a District Judge, by Rule 42, Federal Rules Civil Procedure, authorize such an order, in a jury trial, over the objections of a defendant, after the trial has commenced, opening statements of counsel have been made, and evidence of plaintiff has been completed, thereby changing the issues on trial and restricting the scope of evidence which may be offered by defendants, when no application for such order is made by any party, and no intimation was given at the opening of the trial that such order might be made?"

Plaintiff's complaint charged three defendants with joint and several negligence in supplying a defective box car to his employer to be loaded with grain. Each defendant denied negligence on its part, and filed cross-claims against its co-defendants seeking to have the ultimate liability for plaintiff's injury imposed on them. No application for separate trial of the cross-claims was made by any party, and there was no suggestion by the court that separate trials might be ordered. The case went to trial

before a jury. Plaintiff's evidence required three days of trial time. When petitioner's counsel started to introduce evidence on its behalf the trial court, in ruling upon objections to evidence, announced that separate trial to the court would be held at a later time upon the cross-claims, "if necessary", and that evidence of defendants would be restricted to the issues presented by the complaint and answer. Petitioners objections to this procedure were overruled.

The second question may be stated as follows:

> "When it appears that empty freight cars are supplied to a large industrial shipper for loading for outbound shipment by numerous railroad companies, and it is the custom and practice of the shipper, acquiesced in by the railroad companies, to substantially pool the the cars so supplied, and load and bill them out on any line of railroad selected by the shipper, and an employee of the industry sustains injury after loading of a car, supplied by one railroad, has been completed for outbound movement on another railroad selected by the shipper, over which the car is immediately billed, does primary liability for defects in the car rest upon the railroad in connection with whose business the car had been loaded, or upon the railroad which supplied the car to the shipper?"

The third question is:

> "Under the circumstances stated above is the railroad company which accepts billing on the shipment, which transports the car to destination, and collects the revenue for such transportation, exempt from liability for defects in the car which might have been discovered by reasonable care?"

Subsidiary questions relate to the admissibility of evidence offered to establish that the railroad supplying the

car performed only a switching service for the line haul railroad, and the propriety of requested instructions which told the jury that, by accepting billing on the car, the line haul railroad assumed responsibility for the condition of the car after loading by the shipper commenced.

No statute of Iowa, or of the United States, is directly involved in this case. It does involve the construction and application of Rule 42 (b), Federal Rules of Civil Procedure.

Rule 42 is as follows:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> (b) Separate Trials. The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues.

STATEMENT OF THE CASE.

Jurisdiction of the District Court in this personal injury action was predicated upon diversity of citizenship; Williams, a resident and citizen of Council Bluffs, Iowa, was plaintiff, and defendants were three railroad corporations, all citizens of states other than Iowa (R. 1-2).

Williams was employed in loading and unloading cars of grain at the terminal elevator of Flour Mills of America in Council Bluffs, operated under the trade name of "Kan-

sas Grain Company." He was injured about 4:20 p. m. on February 10, 1953, when the door of the box car, which he had loaded with shelled corn, fell upon him while he was endeavoring to close the car door and place a seal thereon. The box car was owned by petitioner, Rock Island, which had sent it to the elevator upon order of the grain company for cars for grain loading. At the time Williams was injured, loading of the car for outbound movement to Denver, Colo., on the line of respondent, Union Pacific, had been completed, but the bill of lading was not signed by Union Pacific until 10:45 a. m. on February 11, 1953, a few business hours after Williams' injury (R. 229).

Cars were loaded at the elevator upon direction from the Omaha office of the grain company (R. 329). Cars were never billed until after the contents of the car had been sampled and the samples graded by the Omaha Grain Exchange (R. 332).

The elevator is adjacent to an industry lead track, called the "River Track," owned by respondent "North Western," over which petitioner, "Rock Island," held trackage rights by contract, thus making the elevator an industry on petitioner's line. North Western performed all necessary switching service for delivering or removing cars at the industry. Union Pacific neither owned nor held trackage rights on any track serving the elevator. The elevator was within the Omaha-Council Bluffs switching district, so that cars moving outbound from the elevator might be billed via Union Pacific, which would, under applicable tariffs, pay, or "absorb" the switching charge of Rock Island for moving the car from the elevator to Union Pacific tracks, out of Union Pacific revenues for movement of the car to destination.

Kansas Grain did business with all railroads serving the Omaha-Council Bluffs terminal area, some ten in number,

and, as occasion required, placed orders for empty box cars with all railroads. It was a frequent practice of the elevator to load cars, supplied on order by one railroad, for outbound movement over some other railroad line, and this practice was known to and acquiesced in by the parties (R. 73, 330, 463).

The complaint charged each defendant with identical specifications of negligence in supplying to Kansas Grain a defective box car, and in failing to adequately inspect the same (R. 3-6). Each defendant denied negligence on its part, and by cross-claims against its codefendants, alleged that its liability to Williams, if any, was secondary in character, while that of its codefendants was primary. Petitioner alleged in the event of recovery by Williams against it, it was entitled to judgment over against Union Pacific (R. 47-48). Williams alone demanded a jury trial of all issues "triable of right by a jury" (R. 18). Two pretrial conferences were held (R. 18 and R. 45); at neither was any suggestion made that separate trials of particular issues would be ordered by the court. No application was made by any party at any time for such order.

Trial commenced before the court and a jury on October 10, 1955 (R. 152). Opening statements were made by counsel for all parties, each defendant being represented by its own counsel. In the opening statement for petitioner, its counsel referred at considerable length to the relationship existing between the three defendant railroads, to the fact that petitioner had received no payment for supplying the car, that the car was loaded for shipment to Denver, Colo, via Union Pacific, and that "factually and legally," while being loaded, the car was in possession of Union Pacific (R. 157-159). No suggestion was made during the opening statements that an order for separate trials of particular issues might be later made.

Upon the trial, Williams' counsel introduced admissions made by the parties which disclosed that Kansas Grain Company, on January 28th and 29th, 1953, placed orders with Rock Island for 35 box cars for grain loading (R. 228); on February 7, 1953, box car R. I. 145287 was inspected by an employee of Rock Island, who placed a card thereon reading "O. K.—Grain"; no further inspection of the car was made by Rock Island prior to Williams' injury (R. 228). A Rock Island switch crew delivered the car to North Western for spotting at the elevator, and, between the hours of 6:30 p. m. and 11:15 p. m. on February 9, 1953, the car was set by North Western in the usual position for empty cars, west of the loading shed at the elevator (R. 228-229).

During the afternoon of February 10, 1953, the car was loaded with grain by Williams and his fellow employees. After loading was completed, the car was moved by elevator employees to a position east of the loading shed, and a sample of grain was taken from the car (R. 229). Williams was injured while attempting to close the door on car R. I. 145287 when the door fell outward from the top of the car (R. 229). The sample of grain was sent to the Omaha Grain Exchange between the hours of 4:00 and 6:00 p. m. that day. On the morning of February 11, 1953, Omaha Grain Exchange notified the Omaha office of Kansas Grain that the car had graded No. 2 yellow corn (R. 229). Employees of the Omaha office of Kansas Grain then prepared a shipper's order bill of lading for shipment of the car to Denver, in which Kansas Grain Company was designated as consignor and consignee, "notify Houlton Grain Company, Denver, Colo." This bill of lading was presented to the general agent of Union Pacific at 10:45 a. m. on February 11, 1953, and signed by an authorized representative (R. 230). The bill of lading is reproduced at R. 310. Union Pacific was the only carrier named in the bill.

Petitioner moved for a directed verdict in its favor at the close of plaintiff's evidence on the ground that it was not shown to have been under any duty to plaintiff with respect to the condition of the box car; that Union Pacific was the only defendant occupying a carrier relationship to Kansas Grain and to plaintiff, and that petitioner was in no manner negligent with respect to said car (R. 274-476). Union Pacific and North Western made similar motions for a directed verdict at the close of plaintiff's evidence (R. 277-280). These motions were overruled by the trial court (R. 281).

When petitioner started to introduce its evidence, the trial court, for the first time, indicated that the issues to be tried would be limited. The court said:

> "Now, whatever the relationship may have been between you defendants I am not going to allow the incidence of your internecine war to deprive the plaintiff of his rights before this jury" (R. 283).

After further extensive colloquy between counsel and the court, shown at R. 284-292, 295-301, the trial was recessed from October 13 to October 17 to permit the presiding judge to meet a commitment at Davenport, Iowa. At the reconvening of court on October 17 counsel for petitioner objected to separate trials of particular issues on the following grounds:

> "Mr. Howland: We object to any separation of the issues for trial, or separate trials of any particular issues as between the plaintiff and as between the defendants themselves, and for grounds state: First, that we entered upon the trial of this case without any previous order or suggestion by the court, or anyone else, that there would be any separate trials of the issues, and having taken all of the evidence of the plaintiff in chief, it takes counsel for the defendant Rock Island entirely by surprise that the issues are to be limited.

"Second, that under the rules, all issues tendered by the pleadings in any case for trial are to be tried at one time, unless there has been a prior order of the court providing for separate trials.

"Third, that issues of fact are tendered by the cross claims and the answers thereto which may or may not ultimately involve questions of fact to be determined by the triers of the facts, and the parties should not be deprived of a jury trial of the issues since a jury trial has been demanded by the plaintiff.

"Fourth, it is factually and legally impossible to separate the issues between the plaintiff and the defendants and any of them without a consideration of the relationship of the defendants, one to the other.

"For all of these reasons, we request that the court permit the trial of all issues which are tendered by the pleadings at one time" (R. 298).

These objections were overruled by the Court (R. 300-301).

The trial court then sustained objections to all evidence offered by petitioner to show the relationship existing between the defendants. Specifically, the following evidence was excluded by the court:

(a) That the elevator was within the Omaha-Council Bluffs Reciprocal Switching District. [Rock Island request for Admission No. 6 (R. 94) excluded (R. 284) and proffered evidence of John A. Christiansen (R. 313-315).]

(b) The inclusion of a particular industry within the limits of a reciprocal switching district in effect extends the rails of all railroads serving the switching district to include such industry. [See proffered evidence of John A. Christiansen (R. 313-315) and ruling excluding same (R. 315).]

(c) The tariffs of Rock Island provide a switching charge of $4.86 per car for movement from Kansas Grain Elevator to interchange point with Union Pacific and Union Pacific tariffs which provided that the Rock Island charge would be "absorbed" or paid by Union Pacific and not by the shipper. [See proffered evidence of John A. Christiansen (R. 308-310, 313-315) excluded by the court (R. 315).]

(d) Union Pacific, by the per diem reclaim code, contracted to pay the owner of each car switched by Rock Island from the elevator to Union Pacific, $2.00 per day for 3.18 days, while the car was being sent to the elevator, loaded, and delivered to Union Pacific. [See Exhibit 16 and particularly rule 1, reproduced (R. 457), excluded by trial court (R. 317-318).]

(e) Rock Island made no charge to the shipper for supplying the car and received nothing for switching the empty car to the elevator for loading. The inbound movement is considered a part of the outbound loaded car movement (R. 346-347, excluded R. 347).

(f) By its contract with Houlton Grain Company, purchaser of the carload of corn, Kansas Grain contracted to ship each car sent to Houlton Grain "via Union Pacific." [See evidence of James K. Franks, who identified Exhibits 19 and 20 (R. 336-338), exhibits reproduced (R. 465-467), excluded by the court at jury trial (R. 338).]

(g) Rules of the Car Service Division of the Association of American Railroads, to which all defendants were subscribers, which provide that "when empty cars delivered to an industry are loaded to other than the road from which received, they should be interchanged as of the date and time actually or constructively placed." [Application of per diem rules to cars delivered industries and taken out by other than the

delivering road reproduced (R. 421). Excluded by trial court (R. 317-318).]

(h) Interchange Rules of Association of American Railroads, identified as Exhibit 21, which provide that "repairs should be made by car owner insofar as may be practicable" (R. 437), and "empty cars furnished orders for specific lading must be in serviceable condition for such lading, the receiving road to be the judge" (R. 438). Excluded by trial court (R. 351).

Petitioner's evidence to the effect that the car, when inspected was free from defects, was received by the court. At the close of all the evidence, petitioner renewed its motion for directed verdict because:

> "The evidence affirmatively shows that with respect to car R. I. 145287, no relationship of carrier and shipper existed at any time material, between petitioner and Kansas Grain Company, employer of plaintiff, and that defendant Union Pacific was the only defendant as to whom such relationship existed."

This motion was overruled (R. 355).

The trial court submitted the case to the jury against all three defendants but instructed that:

> "A railroad owes to a shipper, such as Kansas Grain Company, a duty to exercise ordinary care to see that the car is in such state of repair that the employees of the shipper, while exercising ordinary care themselves, can enter upon and work about such car with reasonable safety" (R. 375-376).

Petitioner requested and the trial court refused to give instructions which told the jury that by accepting billing, Union Pacific assumed responsibility for the condition of the car from the time that loading was commenced, and the fact that it did not have physical possession of the car, and made no inspection before accepting billing thereon,

did not relieve it of responsibility. (See petitioner's requested instructions 5 and 6, R. 358.)

The court advised the jury that it should return its verdict against the defendant or defendants, found to have been negligent, and that it need not find against all, or in favor of all defendants (R. 370). The jury returned its verdict against petitioner alone, in the sum of $42,890.27, upon which judgment was entered on October 19, 1955 (R. 384-385). While eight forms of verdict were submitted to the jury by the court, no verdict was returned by the jury as to the other defendants (R. 381). Union Pacific and North Western filed motions to amend the verdict, and to alter or amend the judgment (R. 386-391). Petitioner filed motion for new trial (R. 391-403).

Because of the protracted illness of District Judge William F. Riley, who presided at the jury trial, these motions were not heard until August 13, 1956, at which time they were submitted to Circuit Judge Whittaker, sitting by designation as a district judge. Petitioner's motion for new trial was overruled, and the motions of its co-defendants to amend the verdict and for judgment were sustained. The court then proceeded to receive evidence, solely for the purpose of making a record, on petitioner's cross-claims against its codefendants. The evidence which had been offered and excluded upon the jury trial was received, although the court viewed it as immaterial. In addition thereto, petitioner introduced in evidence its Exhibit No. 22, which was circular T71, issued by the Association of American Railroads (to which all defendants were subscribers), which provided in part as follows:

> "It is the obligation and right of the road haul carrier (in this case, Union Pacific), to provide cars for loading on another line in switching service for movement to or via such road haul carrier, except as otherwise provided in paragraph three.

3. It is the obligation of the road performing the switching service to provide equipment under the following conditions:

(a) When cars are to be loaded to a destination within the same switching limits.

(b) When suitable cars owned by the road-haul carrier or other ownerships which may be used in accordance with Car Service Rules are available on loading line within the switching district.

4. A road should not load its own equipment in switch service when such loading is for movement via road-haul connection if such road-haul connection is able to promptly furnish cars which can be used in accordance with the Car Service Rules and which can be delivered for loading if ordered by the switching line. (Such application is in violation of Car Service Rule 1.)" (R. 434-435.)

James K. Franks, traffic manager for Kansas Grain, reidentified Exhibits 19 and 20 and they were received in evidence (R. 465-467). Franks testified:

"I have the numbers of the cars which were loaded at the Kansas Grain Elevator in Council Bluffs on February 10, 1953, and I also have the outbound billing on the days those cars were moved out. There were five cars of corn and one car of oats loaded on February 10, 1953. Of the cars loaded that day, there was one car of oats that moved out on the Rock Island railroad. There were three cars of No. 2 yellow corn billed to Sikeston, Missouri, a point on the Missouri Pacific railroad, one car of corn billed out on the Missouri Pacific to Little Rock, Arkansas, and one car to Denver on the Union Pacific. The Denver car was R. I. 145287" (R. 463).

At the close of petitioner's evidence, its cross-claims against its codefendants were dismissed and judgment was entered in favor of Union Pacific and North Western (R. 483-486).

Upon appeal to the Court of Appeals for the Eighth Circuit, the judgment of the District Court was in all respects affirmed. That court ignored the practice of the grain company of substantially pooling the available cars, and billing them out via lines other than the line from which received and the acquiescence therein by railroads serving the elevator. The Court said that although the box car had been loaded with grain for shipment on the line of Union Pacific from the Council Bluffs elevator to Denver, Colorado:

> "Union Pacific did not have possession of the car and at that time did not know it was to have possession of the car. The North Western had to do only with the switching of the car so as to make it available for loading at the grain elevator. * * * No party to this action other than Rock Island could possibly have been guilty of common law negligence in connection with the inspection of this car."

The Court further said:

> "No cause of action was proved against either the North Western or the Union Pacific and they were entitled to directed verdicts in their favor."

Having held that Rock Island was the only defendant against which any negligence was shown, the Court brushed aside all other errors urged by petitioner. With respect to the action of the court in ordering a trial of the cross-claims of the defendants separate from the trial of plaintiff's action against the defendants, the court ignored the fact that the order for separate trials was not made until the plaintiff's evidence had been concluded, although such fact was pointed out in the briefs below.

The Court of Appeals cited Rules 20 (b), 21, and 42 (b) as expressly authorizing the order for separate trials. The court concluded:

> "These rules give the court broad discretion in these matters of procedure and its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. In the instant case, we think the court exercised a wise discretion in ordering the issues separately tried."

The Court of Appeals dismissed petitioner's complaint based upon the exclusion of its evidence offered at the jury trial, showing the relationship which existed between the defendants, as relating only to, "agreements entered into by certain railroads in the Omaha-Council Bluffs Switching District." The court said:

> "Plaintiff was not a party to any of these contracts or documents and there is no evidence that he had any knowledge of their existence. His action was not based upon any contract but was an action to recover damages for proximately causing personal injuries suffered by him. * * * Nothing contained in any of these documents could have affected his right to recover for common law negligence."

With respect to the refusal of petitioner's requested instructions numbered five and six, in which petitioner requested the trial court to instruct the jury that by accepting billing on the car, Union Pacific assumed full responsibility for its condition from the time loading was commenced, the court said:

> "We have already held in this opinion that no liability could attach to Union Pacific because of the accident resulting in plaintiff's injuries. * * * The short answer to the complaint is that these requested instructions did not correctly state the applicable law."

ARGUMENT.

The Order for Separate Trials.

In our statement of the case we have pointed out that no intimation was given by the trial court that separate trials of particular issues were contemplated until after more three days of trial, during which plaintiff's evidence was completed. The record thus squarely presents the question:

> Does the discretion to order separate trials of particular issues, vested in a district judge by the provisions of Rule 42 (b), authorize such an order in a jury case, after opening statements of counsel have been made and the evidence of plaintiff completed?

The Court of Appeals answered this question in the affirmative, but gave no consideration to appellant's contention that the time and the conditions under which the order was made disclosed an abuse of discretion by the trial court.

We believe it is essential to a fair trial of any law suit that the parties and their counsel at the outset of the case, have a clear understanding of the issues which are to be tried. This is true because opening statements are made by counsel in the light of the issues upon which evidence is to be offered. Evidence may be relevant and material upon certain issues and not otherwise. Objections to evidence are necessarily made or withheld, depending upon the scope of the issues.

In the absence of an intimation by the court that the issues on trial were to be limited, counsel for petitioner was justified in assuming that the whole case was on trial. It is apparent that had counsel for petitioner understood that the relationship of the various defendants to the car was not to be inquired into, a vastly different opening

statement would have been made. Much of the evidence introduced by plaintiff in this case in chief could and would have been objected to as immaterial and irrelevant, had the issues then been restricted. For example, evidence relating to the movement of the box car subsequent to the time of plaintiff's injury, and its condition when received by Union Pacific would have been neither relevant nor material, if the issues were limited.

The Court of Appeals cites Rules 20 (b), Rule 21 and Rule 42 (b) as granting a broad discretion to the trial court with respect to ordering separate trials of particular issues. This we concede. But we believe such discretion cannot be unlimited. An order for separate trials of particular issues after the evidence of one party has been completed in a jury trial is, we submit, so unusual, and so manifestly unfair, that it should shock the conscience of anyone familiar with judicial proceedings. Had such an order been made in a nonjury case, it would have been irregular, but might not have been prejudicial. In a jury trial, its effect could not be non-prejudicial to defendant. Not only was petitioner unable to introduce evidence discussed in the opening statement of counsel, but it was placed in the intolerable position of being unable to meet or explain the relationship between defendants concerning which plaintiff had introduced evidence. No precedents have been found in cases considering Rule 42 which indicate that such conduct of a jury trial is within the judicial discretion vested in district courts by the rule.

We cannot believe that such procedure can receive the approval of this court. We say, therefore, that the Court of Appeals for the Eighth Circuit has, by its ruling upon this point, sanctioned such a departure from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision. The importance of a clear cut decision by this Court of

the extent to which trial courts may exercise their discretion to order separate trials of particular issues is quite apparent. If the discretion be sufficiently broad to authorize what was done below, the bench and bar should, we believe, be so advised.

The Liability of the Railroads.

The Court of Appeals for the Eighth Circuit has held that Union Pacific had no legal obligation with respect to the condition of the car, although it had acquiesced in the practice of Kansas Grain to load empty cars, supplied by one railroad, for outbound movement over any other railroad, although the car had been loaded for shipment on the line of Union Pacific and although it, shortly after Williams' injury, accepted billing and received the revenue for transporting the car to destination. This ruling seems plainly erroneous, for the very authorities which the Court cites in support of its conclusion state that:

> "A railroad company owes a duty to all persons who are required to go on or about its cars, or cars furnished by it **in connection with its business**, to exercise reasonable or ordinary care to inspect such cars." (75 C. J. S. pp. 333-337.)

We readily concede that if the car, at the time Williams' injury, was being used in connection with the business of petitioner, then it should bear the liability for any defect in the car due to negligence. But, if the car was then being used in the business of Union Pacific, no just rule of law will permit that railroad to reap all the benefits of using the car without assuming liability for defects causing personal injury.

We think the rule of law which governs this case is set forth in The Restatement, Torts, Sec. 392, p. 1064, in which it is said that "one who supplies to another, directly or through a third person, a chattel to be used for

the supplier's business purposes is subject to liability to those for whose use the chattel is supplied" for negligence in failing to inspect, to warn the user of defects, or otherwise exercise reasonable care. Continuing on this same subject the following significant language is found on page 1067 of the Restatement:

> "On the other hand, when everything necessary to the performance of the supplier's contract or the completion of his business dealings is done, the fact that he permits his chattel to be used by those to whom previously he has supplied it for his business use, does not make such further use of the chattel a use for the supplier's business purposes. Where a railroad accepts freight for delivery at its terminal, but on a particular occasion, as a convenience to the consignee, permits him instead of unloading the car at its terminal, to arrange for transportation of the car to his place of business by a connecting carrier, the transportation of the car by the connecting carrier is not a use for the railroad's business purpose."

The record here shows that the car was used by the Grain Company in all respects as though it had been supplied by Union Pacific, pursuant to a custom and practice in which all railroads concurred. After the elevator employees started to load the car for outbound movement via Union Pacific, the car was no longer used in petitioner's business and under the Restatement, its responsibility ended.

Williams' injury occurred in Iowa, and under Erie Railroad v. Tompkins, 304 U. S. 64, 84 L. Ed. 1188, the law of that state governs. The Iowa Supreme Court in the recent case of Jackson v. C. M. St. P. & P. R. R. Co., 238 Iowa, 1253, 30 N. W. (2d) 97, has recognized the rule for which we contend. In that case the Milwaukee Railroad supplied a car, owned by Nickel Plate Railroad, to a shipper

for loading with soy beans, and transported it from point of origin to Des Moines where it was delivered to another railroad. In affirming a judgment against the Milwaukee Road in favor of an employee of the consignee, for an injury sustained when the car door fell upon him, the Iowa Court said:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. * * * (Citing cases.)
>
> "It is not material that the car in question was the property of the Nickel Plate Railroad. Defendant had assumed control of it and was as much responsible for its condition as for one of its own cars." (Citing cases.)

The Court of Appeals in its opinion cites and relies upon the Jackson case from the Iowa Supreme Court to support its conclusion that the petitioner was primarily, and exclusively, liable for the condition of the car. It ignores the language of the Iowa decision that it is **"the duty of the initial carrier"** to exercise care to furnish a safe car for loading. We think the Iowa Supreme Court used the words "initial carrier" advisedly, and did not mean thereby that any railroad supplying a car to an industry is liable, even though the car has been loaded for movement over an entirely different railroad. In the case at bar Union Pacific was the initial carrier, and so, we believe, was primarily liable to Williams under the Jackson case. There is no other Iowa decision on the point.

In the proper functioning of our dual judicial system of state and federal tribunals this Court has many times said

it is necessary that the courts of the United States adhere to and carefully follow the applicable state law. The federal courts, certainly, should not attempt to apply their own ideas of what state law should be in deciding tort cases arising under diversity of jurisdiction. In the case at bar we think the lower courts either completely disregarded the Jackson decision, or did not follow the plain language of the Iowa opinion, because they felt the Iowa court meant to say something very different from what actually appears on the printed page. It is quite impossible to harmonize the statement of the Iowa court that the duty of exercising care to supply reasonably safe cars is imposed on the "initial carrier," with the conclusion of the Court of Appeals that the initial carrier, in the case at bar, was entitled to a directed verdict.

Not only has the Court of Appeals ignored and misapplied the law of Iowa in its decision in this case, but its opinion also conflicts with the pronouncements of the Courts of Appeal of other Circuits on the same subject, and with the decisions of practically all state courts of last resort. These courts hold that a railroad is under obligation to use care to supply to a "shipper" cars free from defects for loading "in connection with its business" or "to be shipped over its line." These words can mean but one thing—there must be a shipper-carrier or carrier-consignee relationship out of which the duty arises. In the case at bar that relationship is absent as to petitioner, but present as to Union Pacific.

Thus, in **Pennsylvania Railroad Company v. Hummel**, 167 F. 89, the railroad company sent to the wharf of I. D. Thomas & Son, box cars to be loaded with merchandise for shipment by that firm over the railroad's line. The Court of Appeals for the Third Circuit, in sustaining a judgment in favor of an employee of the shipper, said:

> "The contract between defendant and Thomas & Son created the condition out of which the duty of the defendant to the plaintiff arose, but the plaintiff's right of action was founded on that duty—a duty imposed by the law and not on the contract."

In **Waldron v. Director General of Railroads**, 266 F. 196, it appeared that a railroad serving a mine supplied cars with defective brakes for loading of coal on a track with a heavy down grade which required that the cars be equipped with good brakes. The Court of Appeals for the Fourth Circuit there said:

> "A carrier furnishing cars to be loaded for shipment is liable for injuries to the shipper or his employee due to a defect in car which might have been discovered by reasonable care and inspection."

The Court of Appeals for the Eighth Circuit used similar language in the cases of **Copeland v. C. B. & Q. RR. Co.**, 293 F. 12, and in **St. Louis-San Francisco RW. Co. v. Ewan**, 26 F. 2d 619. Numerous cases from other circuits using similar language might be cited.

At times it has been suggested by counsel for Williams and other respondents that, since petitioner was called upon to switch the car back to Union Pacific, such fact constitutes a basis for holding that the car was being used in petitioner's business when Williams was hurt. This contention ignores the fact that petitioner acted as a mere switching railroad in handling the out bound car. It was hired by Union Pacific to shunt the car from the elevator to the nearest Union Pacific track in Council Bluffs, and for this service it was paid by Union Pacific, which, by tariff, "absorbed" petitioner's charge for its service. Petitioner was not a carrier named in the bill of lading. Union Pacific was both the initial and the delivering carrier.

A switching railroad which performs the service of switching a car from an industrial side track to the line of railroad over which the car is billed, is not a carrier, but a mere agent of the "line haul" carriers named in the bill of lading. Such was the holding of this court in Missouri Pacific Railroad Company v. Reynolds-Davis Grocery Company, 26 U. S. 366, 69 L. Ed. 1000. There a carload of sugar was shipped from a point in Louisiana to Ft. Smith, Ark., on a through bill of lading, which designated several railroads, the last of which was the Missouri Pacific. Missouri Pacific served Fort Smith, but the consignee's warehouse was located on a siding served by St. Louis-San Francisco Railroad. Missouri Pacific turned the car over to the Frisco line for spotting at the warehouse and paid the switch charge of the Frisco. While the car was in the possession of the Frisco line, part of the sugar was lost. The Missouri Pacific contended that it was not the delivering carrier and, therefore, not liable under the Federal statute for loss of the shipment. This court, speaking by Mr. Justice Brandeis, said:

> "Its (Missouri Pacific) lines enter Ft. Smith, but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading, and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

The courts have had occasion to consider the relation between a switching railroad, in a terminal area, and a line-haul carrier on but few occasions. In each instance in which the matter has been considered the holding has been that a switching railroad whose charges are absorbed or

paid by the line-haul railroad is under no liability to a consignor or consignee of freight.

Shapiro v. Boston & Maine R. R. Co., 99 N. E. 459, 213 Mass. 70;

St. L. & S. W. R. R. Co. v. Jackson & Co., 118 S. W. 853 (Tex. Civ. App.);

Houston E. & W. Texas Railway Co. v. Packing Co., 221 S. W. 316 (Tex. Civ. App.).

The Interstate Commerce Commission has frequently dealt with reciprocal switching rates in cases involving services of the character performed by petitioner in the case at bar, and has consistently held that the switching road acts merely as an agent of the line-haul railroad named in the billing.

Mitchell Chamber of Commerce v. C. M. & St. P. Ry. Co., 129 I. C. C. 451, 456;

Live Stock at Chicago, 213 I. C. C. 330, 341;

R. W. Burch, Inc., v. Railway Express Agency, 201 I. C. C. 51, 52;

Reciprocal Switching at Mobile, 208 I. C. C. 151, 155.

Numerous cases might be cited from various state courts of last resort which hold that it is a **carrier's** duty to supply to a **shipper** cars reasonably free from defects. A railroad company may or may not be a carrier, and a shipper, of course, is never a shipper, except as to the carrier with which it does business. One very pertinent decision from the Pennsylvania Supreme Court recognizes the rule for which we contend.

In Rick v. N. Y. C. & St. L. R. R. Co., 81 Atlantic 650, the opinion shows Union Rolling Mills was located within the Cleveland, Ohio, switching district, but was served by a switch track of Erie Railroad Company. A car was loaded with bar iron at the rolling mill, billed over defendant's line to Girard, Pa., and spotted on the consignee's

private siding. Rick, consignee's employee, while unloading the iron, was injured by a defect in the car. One of the contentions advanced by defendant was that the car was supplied by Erie Railroad Company, and that it had no chance to inspect the interior of the car prior to receiving it in a switching movement from the Erie. The Pennsylvania Supreme Court rejected the contention, and, in the course of its opinion, said:

> "It is immaterial who owned the car in question. It was furnished for the purpose of carrying the iron which the defendant company, in consideration of the freight charges paid it for the entire distance, agreed with the consignor to transport from Cleveland to Girard. Its contract required it to take the iron loaded at the mills; and hence it must be assumed, in the absence of evidence to the contrary, that it did so by the use of the car in which the iron was loaded and transported to its destination. The fact that the Erie Company did the switching to place the car on the defendant's tracks does not prove that it furnished the car, or that the defendant company did not furnish it, or relieve the latter company from its duty to have the car efficiently inspected and kept in proper repair. The Erie Company had no contract with the Rolling Mills Company or its sales agent to carry the iron from Cleveland to Girard. That company simply switched the car from the mill to the track of the defendant company, which, by its bill of lading, agreed to transport the iron from Cleveland to its destination."

The courts below have held that Union Pacific made the car its own, and became responsible to employees of the shipper for defects therein, only by signing the bill of lading. This ignores the fact that loading of the car is a necessary part of its transportation, and an integral part of the movement from the elevator at Council Bluffs

to destination at Denver. Under this ruling a railroad carrier is never liable to employees of a shipper for defects in a car unless it has supplied the car, or actually signed the bill of lading. The patent fallacy of such a rule is apparent when we consider that a railroad carrier would thereby escape liability for injury to a shipper's employee if it did not supply the car, but would be liable if it furnished the car itself. We submit that such splitting of a railroad's responsibility for the condition of cars used in its business is both illogical and impractical. Under this rule, if a car were shipped to the elevator on one railroad, the grain unloaded, and the car reloaded for outbound shipment over another railroad, neither railroad would be responsible for the condition of the car while being reloaded.

We believe that the foregoing authorities demonstrate that petitioner at the time of Williams' injury was making no business use of the car and was under no liability to Williams. By its requests for instructions numbered 5 and 6 petitioner presented to the trial court the legal issue that if it was under any liability to Williams, Union Pacific was also jointly liable. The requests were denied by the trial court. The Court of Appeals sustained the trial court because Union Pacific was entitled to a directed verdict. If Union Pacific was under any obligation with respect to the car this was error, prejudicial to petitioner, because Iowa law permits contribution between joint tort-feasors. Best v. Yerkes, 77 N. W. (2d) 23. (Not yet published in Iowa Reports.)

We think the Court of Appeals for the Eighth Circuit has erroneously decided an important question, involving the construction and application of Rule 42, Federal Rules of Civil Procedure, which should be reviewed and determined by this Court. That the question is of general importance in the administration of Rule 42 is obvious. The stage of the trial at which the order was made, pre-

sents, we believe, not only an abuse of discretion, but a denial of fundamental rights which the Rule was intended to protect. It is equally plain that in holding Union Pacific entitled to a directed verdict, the Court of Appeals did not follow the decision of the highest court of the State of Iowa upon the question. We believe that the case is one in which this Court should exercise its discretion to review and decide both the procedural and substantive questions of law presented by the record.

Petitioner therefore prays that certiorari be granted.

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APPENDIX A.

Opinion.

United States Court of Appeals.
For the Eighth Circuit.

No. 15,662

Chicago, Rock Island and Pacific Railroad Company, a Corporation, Appellant,

vs.

W. E. Williams, Chicago and Northwestern Railway Company, a Corporation, and Union Pacific Railroad Company, a Corporation, Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[June 6, 1957.]

A. B. Howland (Oscar E. Johnson, Robert M. Stuart and B. A. Webster, Jr., were with him on the brief), for Appellant.

Harold T. Beckman (John LeRoy Peterson was with him on the brief), for Appellee, W. E. Williams.

J. H. Anderson (F. J. Melia, G. C. Holdrege, F. J. Given and Addison C. Kistle were with him on the brief), for Appellee, Union Pacific Railroad Company.

Ray H. Johnson, Jr. (Frank W. Davis and Davis, Huebner & Johnson were with him on the brief), for Appellee, Chicago and Northwestern Railway Company.

Before Gardner, Chief Judge, and Vogel and Van Oosterhout, Circuit Judges.

Gardner, Chief Judge.

This was an action sounding in tort brought by appellee William E. Williams against the Chicago, Rock Island and Pacific Railroad Company, the Chicago and Northwestern Railway Company and the Union Pacific Railroad Company to recover damages on account of personal injuries suffered by plaintiff while he was attempting to close a door on a box-car owned by the Chicago, Rock Island and Pacific Railroad Company. He charged the three named railroad companies jointly and severally with negligently furnishing plaintiff's employer, the Kansas Grain Company, with a box-car whose door and track mechanisms were in a broken, dangerous, defective, unsuitable and unsafe condition. The defendants answered separately each admitting the occurrence of the accident resulting in plaintiff's injuries but denying they were guilty of negligence, and the Rock Island also pleaded contributory negligence and it filed cross-claims against the Northwestern and Union Pacific. As against the Northwestern it prayed that "* * * in the event that any liability be established against either this defendant or Chicago & Northwestern Railway Company, the court adjudicate, declare and determine the rights of the respective defendants as between themselves and thereupon determine that any liability established by or against either this defendant or Chicago & Northwestern Railway Company constitutes a part of the cost of the switching operation on or over the River Track and is to be borne and shared equally by the three parties to the contract of November 21, 1910, or in the alternative that the court find, declare and determine that the primary liability, therefore, is upon Union Pacific Railroad Company, and that upon payment of any judgment or any part thereof which may be rendered against this defendant or defendant Chicago & Northwestern Railway Company, either or both of said defendants shall be entitled to judgment over against

Union Pacific Railway Company." In its cross-claim against the Union Pacific it prayed: "1. That this court find, determine and adjudicate that as between defendant Chicago, Rock Island & Pacific Railroad Company and defendant Union Pacific Railroad Company, Union Pacific Railroad Company is primarily liable to plaintiff and that this defendant is in no manner liable for plaintiff's injuries; in the event that any liability is imposed on this defendant that the court find, determine and adjudicate that the primary liability therefor rests upon defendant Union Pacific Railroad Company and not upon this defendant. 2. That if any judgment be rendered against this defendant in favor of the plaintiff in this action that the court find, determine and adjudicate that on payment thereof that this defendant is entitled to judgment over against defendant Union Pacific Railroad Company * * *." In due course these cross-claims were answered separately by the Northwestern and the Union Pacific. The issues joined by the plaintiff and the defendants were separately tried before the court and a jury and the jury found the issues in favor of the plaintiff and against the Rock Island alone. The issues joined between the railroad defendants were thereafter tried by the court and were determined in favor of the Northwestern and the Union Pacific.

The defendants are referred to in the record and briefs as the Rock Island, the Northwestern and Union Pacific and they will be so designated in the course of this opinion.

At all times pertinent to the issues here involved William E. Williams, plaintiff, was in the employ of the Flour Mills of America, Inc., operating a one and one-half million bushel capacity grain elevator in Council Bluffs, Iowa under the trade name of Kansas Grain Company. This grain elevator was served by lead tracks or spurs owned by the Northwestern.

On January 28 and 29, 1953, Kansas Grain Company placed orders with the Rock Island for thirty-five empty cars for grain loading. Thereafter, on February 7, 1953, one Bert Neumann, a Rock Island employee at Council Bluffs, inspected car RI 145287 and placed thereon a placard reading "OK—Grain". On the morning of February 9, 1953, this car was taken to the so-called River Track by the Rock Island and later that day was switched to Kansas Grain elevator by the Northwestern. When plaintiff Williams came to work on the morning of February 10 this car was one of several on the elevator loading track and during the afternoon of that date, he loaded the car with 112,000 pounds of shelled corn and it was then moved to the east on the loading track eighty to one hundred feet where Sigler, another employee of the elevator, took samples of the grain and closed and sealed the door on the southerly side of the car. Williams, observing that some difficulty was encountered in attempting to close the door on the northerly side of the car, suggested that he would take over closing that car door while Sigler secured samples from another car which Williams had just finished loading. Williams and Rounds, another elevator employee, attempted to close the door. Williams first pried at the westerly end of the door with an iron bar some three feet in length and was able to move the door only a short distance to the east in this manner. A chain with a ring on one end was then secured, passed around the handle of the door, the bar was passed through the ring and placed against the easterly side of the door-stop at the east door opening and the door was moved some two or three feet in this manner to within eighteen inches of being closed. Williams then laid the bar down and engaged in some further conversation with his co-employee when a popping or cracking noise was heard. Rounds shouted, "Look out," and Williams looked up and saw that the car door was out of the door track at the top some two feet and was falling outward. The door fell on

Williams. It weighed some eight hundred to one thousand pounds. Williams sustained injuries consisting of three fractured vertebrae, a fracture of the tibia and fibula of his right leg, the loss of teeth and multiple contusions, abrasions and lacerations about his head, legs and body.

In this type of box-car normaliy the top of the door is held next to the car by a door-cap which extends down over the edge of the door and is equipped with a guide going outside the cap in order to keep the door in a rigid position. The door-cap serves as a guide or track to the upper part of the door. The door is opened and closed by moving it along a rail known as the lower door-track. The movement of the door is facilitated by the lowering of a roller located near the lower edge of the door onto the door-track. In the absence of defects, the top of the door extends into the door-cap about one inch.

Evidence introduced by the plaintiff warranted the jury in finding that the lower door-track and side-sill of this car, at the time of the occurrence, was sagged about three-fourths of an inch. The weld was broken between the lower door-track and the left-hand door-stop. The siding of the car at the lower right-hand corner of the door-opening was pulled away from the floor. The right-hand door-post was broken beneath the lower door-rail and the width of the break was approximately three-quarters of an inch. These were old breaks. The function of the door-post is to connect the lower underframe with the upper roof section and the purpose is to bind the top to the bottom underframe of the car in a rigid position. The breakage of the post would have a tendency to allow the side sill to sag or create an excessive amount of distance between the lower door-track or door-rail and the upper door-cap.

There was testimony produced on behalf of the Rock Island conflicting with that offered on behalf of plaintiff as to the condition of the car door when it was delivered

to plaintiff's employer but we assume the conflict was resolved by the jury in favor of plaintiff. There was also testimony offered by defendant Rock Island going to the extent of plaintiff's injuries.

On the day following the accident a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by the Union Pacific on such date. The car was then removed by an engine crew of the Northwestern, taken by the Rock Island to its Council Bluffs repair track where the door was replaced and held by the Rock Island until it was switched to the tracks of the Union Pacific on February 23, 1953, at which time the Union Pacific for the first time took physical possession of the car. The car was inspected by the Union Pacific on February 24, 1953, and "bad ordered" at that time for worn brake heads and because one of its doors was out of the top door track. Repairs were completed on February 24, 1953, and the Union Pacific thereupon transported the car to Denver, Colorado, over its own line of railroad. The evidence will be further developed in the course of this opinion.

At the close of plaintiff's evidence in chief each of the defendants separately moved for a directed verdict which motions were denied and at the close of all the testimony these motions were renewed and were again denied and the case was submitted to the jury on instructions to which certain exceptions were saved by the defendant Rock Island. The jury returned a verdict in favor of plaintiff and against the Rock Island alone in the sum of $42,890.27, pursuant to which the court entered judgment.

As has been observed the Rock Island laid the basis for challenging the sufficiency of the evidence to sustain the verdict by moving for a directed verdict in its favor at the close of all the evidence. It is to be noted, however,

that in its brief the sufficiency of the evidence to establish negligence in the inspection of its box-car here involved is not challenged. It bases its claim for reversal not on the fact that there was lack of proof of common-law negligence, which was the proximate cause of plaintiff's injuries, but on the ground that it could not be held responsible for the negligence of its employees in inspecting the box-car furnished plaintiff's employer because the relationship of shipper and carrier, or carrier and consignee, did not exist at the time of the accident. Its contention in this regard is stated in its brief as follows:

> "The contention of appellant is that Rock Island was under no duty to supply Kansas Grain Company with boxcars for shipments to be made over the line of Union Pacific; that the duty to exercise care to supply a reasonably safe and suitable boxcar arises out of the relationship of shipper and carrier, or carrier and consignee. Since plaintiff's injury occurred while the car was being loaded for outbound movement via Union Pacific, that line, by accepting the billing, necessarily assumed responsibility for the car, at least from the time that loading was commenced."

It will be recalled in this connection that thirty-five box-cars were requisitioned by the Kansas Grain Company from the Rock Island to be loaded with grain for shipment over various railroad lines. The car was inspected by the Rock Island and marked "OK—Grain." It was then loaded and subsequent to being loaded the plaintiff attempted to close the northerly door with disastrous results. The Union Pacific did not have possession of the car and at that time did not know it was to have possession of the car. The Northwestern had to do only with the switching of the car so as to make it available for loading at the grain elevator. Plaintiff's action is based upon common-law negligence and not upon breach of any contract. No party to this action other than the Rock Island could

possibly have been guilty of common-law negligence in connection with the inspection of this car. It was its car and it inspected it and in effect commended it as fit for use. In these circumstances we think it was responsible for the results of its negligence in this regard. **Jackson v. Chicago, M., St. P. & P. R. Co.**, Ia., 30 N. W. 2d 97; **Pennsylvania R. Co. v. Hummel**, 3 Cir., 167 F. 89; **Copeland v. Chicago, B. & Q. R. Co.**, 8 Cir., 293 F. 12; **St. Louis-San Francisco Ry. Co. v. Ewan**, 8 Cir., 26 F. 2d 619; 75 C. J. S., Railroads, Sec. 924, p. 333. In **Jackson v. Chicago, M., St. P. & P. R. Co.**, supra, the Supreme Court of Iowa had occasion to consider a case in which the facts were quite similar to those in the instant case except that in the Iowa case the car was furnished by the initial carrier. In the course of the opinion it is said, inter alia:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. (Citing cases.)
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> "Plaintiff as an employee of the consignee stood in the position of an invitee to whom defendant owed the duty of reasonable care. **Spears v. New York Cent. R. Co.**, 61 Ohio App. 404, 22 N. E. 2d 634, 637; **Corbett v. New York C. & H. R. R. Co.**, 215 Mass. 435, 102 N. E. 648; **Ryan v. New York, N. H. & H. R. Co.**, C. C. N. Y., 115 F. 197; **Louisville & N. R. Co. v. Freppon**, supra, which also holds an employee of the consignee has a right to assume a freight car delivered the consignee for unloading will be reasonably safe for his use.
>
> "It is not material that the car in question was the property of the Nickel Plate Railroad. Defendant had

assumed control of it and was as much responsible for its condition as for one of its own cars. (Citing cases.)

"'The right of a servant of a consignee to recover for injuries sustained by reason of defects in a car which he was engaged in unloading has frequently been affirmed.' Anno. 41 A. L. R. 8, 125-127."

What is said by us in **St. Louis-San Francisco Ry. Co. v. Ewan,** supra, is a persuasive if not controlling answer to the contention of the Rock Island in this case. We there said:

"* * * It is a carrier's duty to use ordinary care to deliver cars reasonably safe for the use of shippers and their employees while the cars are being loaded or unloaded. **Copeland v. Chicago, B. & Q. R. Co.** (C. C. A.), 293 F. 12, 15. The employer's duty to provide for the employee a safe place in which to work may be added in the circumstances but does not supplant the carrier's duty. 'The carrier cannot impose this duty to furnish cars reasonably safe on the shipper, to its own relief from liability for injuries to an employee of the shipper. If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employee to be loaded, the carrier and shipper are both liable to the injured employee; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to assume that cars furnished have been inspected by the carrier and found reasonably safe.' **Waldron v. Director General of Railroads** (C. C. A.), 266 F. 196, 198.

"2. The liability of the carrier does not arise out of contract but out of a duty imposed by law. **Penn-**

sylvania Railroad Co. v. Hummel (C. C. A.), 167 F. 89, 94. That duty extends, not only to the shipper, who has actually entered into contract with the carrier, but to the employee of that shipper, although, of course, there is no contract between employee and the carrier. Waldron v. Director General of Railroads, supra; Pennsylvania Railroad Co. v. Hummel (C. C. A.), 167 F. 89, 94. Nor is the duty restricted to the employees of the shipper having a contract with the carrier. As this court said in Copeland v. Chicago, B. & Q. R. Co., supra, it extends to those 'who are to handle the freight in and out' of the cars. Therefore in this case it extended to the plaintiff, even although the contract with the defendant was not directly with the plaintiff's employer, but with that employer's selling agent, the Mackie-Clemens Company. The employer, the Quality Coal Company, was the shipper, and the cars were furnished by the defendant for its use. The duty of the defendant certainly extended to that company and its employees."

The applicable law is aptly stated in Corpus Juris Secundum, supra, as follows:

"A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning. These duties may be owing to the shipper and to his employees, with respect to loading, or to the consignee, and to his employees, with respect to unloading. A breach of duty of this nature constitutes negligence, and, for such a breach, the railroad company may be

liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship."

In the instant case the Rock Island not only furnished the car but it owned the car and inspected the car and represented that it was in good order.

In its motion for a directed verdict the Rock Island sought to have the court not only exonerate it from responsibility but to hold the defendant Union Pacific liable. Thus it was urged in its motion that "* * * defendant Union Pacific Railroad Company by its acts and conduct, and by accepting billing on the car in question elected to have switching service performed for its account by the defendant Chicago, Rock Island and Pacific Railroad Company, and thereby necessarily assumed responsibility for the injury and damage which was sustained by plaintiff in this action." It thus appears that the Rock Island was contending that the Union Pacific was primarily liable because it accepted billing on the car. It has already been observed that the Union Pacific did not accept billing on this car until the day following the accident. Until after that time it had not had physical possession of the car, it had no control over the car, it had no opportunity to inspect the car and it had no duty to inspect the car, it did not even know the car was to be billed over its line of railroad and it certainly had no duty to perform relative to its condition until it had possession under a bill of lading. In these circumstances it could not be held to be guilty of common law negligence with reference to the

condition of this car. We conclude that the court committed no error in denying the Rock Island's motion for a directed verdict.

The Rock Island complains of the ruling of the court in denying its motion to quash plaintiff's request for admission No. 26 and in overruling its objections to plaintiff's request for admissions Nos. 24, 25, 26 and 27, when offered in evidence. The request was made by plaintiff pursuant to Rule 36, Federal Rules of Civil Procedure. This rule among other things requires that "Each of the matters of which an admission is requested shall be deemed admitted unless * * * the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement * * * or (2) written objections * * *." The Rock Island failed to comply with this rule and the court correctly held that by so failing it admitted the truth of the inquiries. The court properly overruled the motion to quash. Rule 36, Federal Rules of Civil Procedure; **Batson v. Porter,** 4 Cir., 154 F. 2d 566; **Beasley v. United States,** D. C. E. D. S. C., 81 F. Supp. 518; **United States v. Laney,** D. C. E. D. S. C., 96 F. Supp. 482. In passing it is to be noted that the Rock Island made requests for admissions as to the history and movement of this car, particularly while in possession of the Union Pacific, subsequent to the accident from the place where the accident occurred to its destination. That the car had received further repairs before it was transported by the Union Pacific was only a part of the history of the handling of the car by the Union Pacific. The court in overruling the objection to the admission of plaintiff's request for admissions said:

> "In order that there may be no misunderstanding, I am going to show the whole history of the movement of this car and I will therefore overrule the objection. I want it for the benefit of the court as well."

The mere fact that the Union Pacific may have made some further repairs on this car was not an admission of any negligence on the part of the Rock Island. The court in its instructions definitely limited the inquiry of the jury to the incident forming the basis of plaintiff's injury and the claim of negligence. The admission of the evidence as to this incident could not be said, under these circumstances, to be prejudicial.

It is next argued that the court erred in ordering a trial of the cross-claims of the defendants against each other separate from the trial of plaintiff's action on its merits. As has been observed the court proceeded to try the action as brought by plaintiff separate from the issues raised by the defendants by their various cross-claims. We think the ruling of the court in this regard was eminently proper. Rule 20 (b), Rule 21 and Rule 42 (b), Federal Rules of Civil Procedure; **Meyercheck v. Givens**, 7 Cir., 180 F. 2d 221; 3 Moore's Federal Practice 2908. Rule 20 (b), supra, provides as follows:

> "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him; and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, supra, provides in part as follows:

> "* * * Any claim against a party may be severed and proceeded with separately."

Rule 42 (b), supra, provides as follows:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

These rules give the court broad discretion in these matters of procedure and its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. In the instant case we think the court exercised a wise discretion in ordering the issues separately tried.

On the trial before the jury the Rock Island proffered testimony in various forms as to numerous agreements entered into by certain railroads in the Omaha-Council Bluffs switching district. These offers were rejected and the Rock Island urges the rulings as reversible error. We cannot agree. Plaintiff was not a party to any of these contracts or documents and there is no evidence that he had any knowledge of their existence. His action was not based upon any contract but was an action to recover damages for proximately causing personal injuries suffered by him. The action was ex delicto and not ex contractu. Nothing contained in any of these documents could have affected his right to recover for common law negligence. They had reference to the issues of contribution or indemnity which only became pertinent and material in the event an adverse verdict was returned against one or more of defendant railroads and the court repeatedly advised counsel for the Rock Island that the exclusion of the proffered testimony did not mean that such evidence would be considered immaterial or irrelevant on trial of the issues between defendants on their cross-claims. Their introduction in evidence could only have confused the jury.

The Rock Island complains that the court erred in giving instructions numbered 17 and 3½. Instruction No. 17 in effect told the jury that they might find a verdict for or against one or more of the defendants. If this was error it was error in favor of the Rock Island because on the undisputed evidence the Northwestern and the Union Pacific were entitled to directed verdicts in their favor. Instruction No. 3½ also told the jury that they might find

a verdict against any or all of the defendants. Here again the instruction was favorable to the Rock Island because the other defendants were, under the undisputed evidence, entitled to verdicts in their favor. The claim of prejudicial error in giving the instructions is wholly without merit.

Complaint is also made that the court refused to give the substance of instructions numbered 5, and 6 requested by the Rock Island, which asked the court to advise the jury as to the legal effect of the action of the Union Pacific in accepting billing on the car on February 11, 1953, after plaintiff was injured. We have already held in this opinion that no liability could attach to the Union Pacific because of the accident resulting in plaintiff's injuries. It cannot therefore be consistently argued that the refusal to give these instructions was erroneous. The short answer to the complaint is that these requested instructions did not correctly state the applicable law.

The Rock Island separately argues that it was error for the court to dismiss its cross-claims against the Northwestern and the Union Pacific. As heretofore stated no cause of action was proved against either the Northwestern or the Union Pacific and they were entitled to directed verdicts in their favor. In this case the jury found the Rock Island guilty of common law negligence in furnishing a box-car which it had inspected and marked as in good order whereas it was in fact in bad order. It was guilty of primary negligence. By its cross-claims it sought indemnity or contribution from its co-defendants. None of the contracts or other evidence introduced by Rock Island in support of its cross-claims specifically provided for indemnity for damages resulting from its own negligence. There was, of course, no contract of indemnity between the Rock Island and other carrier parties to the contracts. The only agreements between the parties were as to traf-

fic matters such as agreements relating to interchange, per diem, etc. No reference whatsoever is made in such agreements as to indemnity of any kind, let alone for personal injury or indemnification against the consequences of another railroad's negligence. A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions. 42 C. J. S., Indemnity, Sec. 5, p. 569 and Sec. 12, p. 580; 27 Am. Jur., Indemnity, Sec. 15, p. 464. In Corpus Juris Secundum, Sec. 5, supra, the rule is stated as follows:

> "The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability, otherwise it is not a contract of indemnity * * *."

As we have observed it is definitely determined in this case that the Rock Island was the active perpetrator of the wrong resulting in plaintiff's injuries. In these circumstances it is not entitled to indemnity. **Rozmajzl v. Northland Greyhound Lines**, Ia., 49 N. W. 2d 501; **Lewis v. United Air Lines Transport Corporation**, D. C. Conn., 34 F. Supp. 124; **Lebeck v. William A. Jarvis, Inc.**, D. C. E. D. Pa., 145 F. Supp. 706. The principle is well expressed in **Lewis v. United Air Lines Transport Corporation**, supra, as follows:

> "But Air Lines overlooks the well-established rule that one whose active negligence has been adjudicated cannot, in an action over, invoke the judgment as proof of his liability to the tort claimant and still escape its effect as a determination of his own primary liability precluding any recovery over."

Numerous other defenses to Rock Island's cross-claims are persuasively argued in the briefs of Northwestern and Union Pacific but as the principle here invoked seems conclusive further consideration of the question would unduly

extend this opinion and serve no useful purpose. We are clear that it was not error to dismiss the Rock Island's cross-claims against these defendants.

It is finally argued that the verdict is excessive. There was evidence from which the jury could reasonably have found that plaintiff's injuries were permanent and that they consisted of three fractured vertebrae, fractures of the tibia and fibula of his right leg, loss of teeth and multiple contusions, abrasions and lacerations about his head, legs and body. There was evidence that at the time of his injuries plaintiff was a man fifty-eight years of age earning from $40 to $76 per week and had a life expectancy of 15.77 years; that he was totally disabled from February 10, 1953, until June 30, 1954; that his loss of wages amounted to approximately $4,400; that his medical and hospital expenses totaled $1,700, and that his permanent partial disability was approximately twenty per cent.

While the verdict is a large one, certainly in view of these facts it could not well be held that the verdict was so excessive as to be monstrous or to shock the judicial conscience. But quite aside from these considerations we have consistently held "that the responsibility for keeping jury awards within reasonable bounds is essentially that of the trial court and not that of this court," and we will not reverse on the ground of excessive verdicts in tort cases such as this. **Railway Express Agency v. Epperson**, 8 Cir., 240 F. 2d 18[illegible] **Glendenning Motorways v. Anderson**, 8 Cir., 213 F. 2d 432; **National Alfalfa Dehydrating & Mill. Co. v. Sorensen**, 8 Cir., 220 F. 2d 858; **St. Louis Southwestern Ry. Co. v. Ferguson**, 8 Cir., 182 F. 2d 949; **Zimmerman v. Mathews Trucking Corp.**, 8 Cir., 203 F. 2d 864. In **Glendenning Motorways v. Anderson**, supra, we said:

> "We have consistently held that in a tort action the question of the excessiveness of a verdict is a ques-

tion to be determined by the trial court on motion for new trial and cannot be considered as ground for reversal."

We have considered all the other contentions urged by appellant in its brief and find them without merit. Convinced as we are that no error prejudicial to appellant was committed by the trial court in the trial of this action the judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court of Appeals for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1956.

Thursday, June 6, 1957.

Chicago, Rock Island and Pacific Railroad Company, a Corporation,
Appellant;
vs.
W. E. Williams, Chicago and Northwestern Railway Company, a Corporation, and Union Pacific Railroad Company, a Corporation.
No. 15,662.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 6th, 1957.